Supreme Court, U.S.
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No. 99-1641

IN THE

Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

MFS INTELENET, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Could the Ninth Circuit, in the context of reviewing a state regulator's implementation of FCC rules under the Telecommunications Act of 1996, usurp the Eighth Circuit's exclusive jurisdiction under the Hobbs Act to determine the validity of those rules?

2. Did this Court's reinstatement of an FCC rule that prevents incumbent telephone carriers from gratuitously disassembling their networks before giving competitors access to them *also* reinstate a different, unappealed set of rules requiring incumbents to custom-build networks for their competitors' benefit?

PARTIES TO THE PROCEEDING

Gillis, William P., in his official capacity as Commissioner of the Washington Utilities and Transportation Commission

Hemstad, Richard, in his official capacity as Commissioner of the Washington Utilities and Transportation Commission

Levinson, Anne, in her official capacity as Chairperson of the Washington Utilities and Transportation Commission

MFS Intelenet, Inc.

U S WEST Communications, Inc.

Washington Utilities and Transportation Commission

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court as follows:

Petitioner U S WEST Communications, Inc., a local exchange carrier that provides telecommunications products and services to the general public, is a wholly owned subsidiary of U S WEST, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. There is no publicly held company that owns 10% or more of the stock of U S WEST, Inc.

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PETITION FOR A WRIT OF CERTIORARI

U S WEST Communications, Inc. ("U S WEST") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App. 1a) is reported at 193 F.3d 1112 (9th Cir. 1999).

JURISDICTION

The decision of the court of appeals was issued on October 8, 1999. The court of appeals denied U S WEST's petition for rehearing and petition for rehearing en banc on January 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue here, 47 U.S.C. §§ 251, 252, and 28 U.S.C. §§ 2342 *et seq.*, are reproduced at App. 87a-111a.

STATEMENT OF THE CASE

This case presents a question of competing priority between two United States Courts of Appeals: the circuit court reviewing the validity of a Federal Communications Commission rule on direct appeal under the Hobbs Act (here, the Eighth Circuit), and the circuit reviewing a state regulator's implementation of the same FCC rule under the Telecommunications Act of 1996 (here, the Ninth Circuit, in the decision under review). In the case below, the Ninth Circuit upheld a state order directing the Petitioner, an incumbent local telephone company, to reconfigure the components of its network in whatever way its competitors demand. The court upheld this order even though (1) the state regulator was simply adhering to an FCC rule that imposed the identical requirement; (2) the Eighth Circuit Court of Appeals had *vacated* that rule on direct Hobbs Act review as contrary to the Telecommunications Act; (3) the Eighth Circuit was in the midst of considering whether to modify its vacation in light of a decision on review by this Court; and (4) the state regulator will be bound by the outcome of the Eighth Circuit proceedings. Rather than defer to the Eighth Circuit's exclusive jurisdiction under the Hobbs Act to reconsider whether the federal rule violated the Telecommunications Act, the Ninth Circuit preempted that jurisdiction and announced that its sister circuit must have erred when it originally vacated the rule.

The Ninth Circuit's decision boils down to a determination that state regulators—and the federal courts reviewing their actions—are free to ignore the circuit court vested with exclusive jurisdiction to review the federal rules that state regulators must follow. Only this Court is in a

position to resolve the circuits' conflicting claims of priority and vindicate the jurisdiction of the Eighth Circuit. Certiorari is warranted to achieve uniformity of federal law under the Telecommunications Act and the orderly litigation of cases among the circuits, as well as to resolve a split between the Ninth and Fourth Circuits regarding the proper jurisdiction of a federal district court reviewing a state regulator's implementation of the Telecommunications Act.

A. The Telecommunications Act of 1996

As this Court recognized last year, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*), "fundamentally restructures local telephone markets," shifting significant authority over those markets from state regulators to the Federal Communications Commission ("FCC"). *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Section 251 of the Act imposes a series of network- and market-opening obligations on incumbent local exchange carriers ("LECs") to enable new competitors to enter the market, *see* 47 U.S.C. § 251, and Congress specifically charged the FCC with adopting rules to implement those obligations. *See id.* § 251(d)(1). Like most FCC edicts, the FCC rules implementing the Telecommunications Act are directly (and exclusively) reviewable in the federal circuit Courts of Appeals pursuant to the Hobbs Act. *See* 47 U.S.C. § 402(a); 28 U.S.C. §§ 2341 *et seq.*

The Telecommunications Act also enlists state public utility commissions to aid in the implementation of the FCC's rules. It requires incumbent local exchange carriers and new entrants to negotiate the terms of their relationships, and if voluntary negotiations fail, authorizes either side to request arbitration by the public utility commission of the state in which the carriers provide service. *See* 47 U.S.C. § 252(a), (b). In those circumstances, the state commission is authorized to "impos[e] appropriate conditions as required to implement [§ 252(c)]," which in turn requires the

commission to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission" pursuant to that section. *Id.* § 252(b)(4)(C), (c)(1). Put simply, any conditions (other than pricing and implementation schedules, *see id.* § 252(c)(2), (3)) imposed under the authority of federal law must be limited to those required to achieve compliance with section 251 and implementing FCC rules. *See also id.* § 252(e)(2)(B).

As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. In order to maintain federal control of federal telecommunications law and policy, Congress subjected state commissions' decisions to judicial review in federal district courts "to determine whether [they] meet[] the requirements of section[s] 251 and [252]." 47 U.S.C. § 252(e)(6). This Court has noted that such review is vital to ensuring the primacy of federal regulation under the Act: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. For purposes of this case, the most important aspect of section 252(e)(6) district court review is that the reviewing court must determine whether the state regulator's arbitral decision "meet[s] the requirements of" section 252, including that section's requirement that state regulators follow FCC rules in arbitrating disputes. *See* 47 U.S.C. § 252(c)(1).

B. The FCC's Network Element Reconfiguration Rules and the Proceedings in the Eighth Circuit and This Court

Section 251(c)(3) of the Act obligates incumbent LECs "to provide, to any requesting telecommunications carrier . . . , nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). The incumbent must further "provide such

unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." *Id.* The FCC adopted a series of rules implementing this provision. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (codified in pertinent part at 47 C.F.R. §§ 51.301 *et seq.*). One FCC rule (at issue in *Iowa Utilities Board*, but not this case) prohibited incumbents from separating requested network elements that they already combine for themselves, except on request by the competing carrier, 47 C.F.R. § 51.315(b) (App. 110a) (hereinafter, the "no-separation" rule). Two other FCC rules (the "reconfiguration" rules) affirmatively required an incumbent, on the competing carrier's request, to perform the acts necessary "to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent [carrier's] network," *id.* § 51.315(c) (App. 110a), and to perform any acts necessary to combine unbundled network elements "with elements possessed by the requesting telecommunications carrier," *id.* § 51.315(d) (App. 110a). The only limitations on these affirmative obligations to reconfigure the incumbent's own network to meet competitors' demands were that the requested combination be "technically feasible" and that it not impair other carriers' access to unbundled elements or to interconnection. *Id.* § 51.315(c)(1)-(2), (d) (App. 110a).

Petitioner U S WEST, other incumbent carriers, and state public utility commissions petitioned for review of the FCC rules under the procedures laid out in the Hobbs Act. Pursuant to those procedures, the petitions were consolidated into a single court—the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit vacated both the no-separation rule (47 C.F.R. § 51.315(b)) and the reconfiguration rules (47 C.F.R. § 51.315(c)-(f)) as contrary to section 251(c)(3) of the Telecommunications Act; according to the court, that section merely requires

incumbents to provide unbundled network elements in a manner that enables competitors to combine those elements *for themselves*. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (9th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

The FCC and others asked this Court to review several aspects of the Eighth Circuit's decision, including its vacation of the no-separation rule. The parties did not seek review of the vacation of the reconfiguration rules, and this Court never addressed those rules. This Court reversed some of the Eighth Circuit's rulings, including its vacation of the no-separation rule. The Court explained that the FCC interpretation embodied in that rule was reasonable because the statute "does not say, or even remotely imply, that elements must be provided only [in discrete pieces] and never in combined form." *Iowa Utils. Bd.*, 525 U.S. at 394. The Court declined to equate "unbundled" with "physically separated," finding the term ambiguous and therefore within the FCC's discretion to construe it. *Id.* at 394-95. In particular, the Court accepted the FCC's grounding of the rule in the nondiscrimination requirement of section 251(c)(3); the FCC contended that the rule was intended to prevent incumbent carriers from arbitrarily disconnecting elements that were already combined, "not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *Id.* at 395 (internal quotation marks and citation omitted). The Court recognized that the no-separation rule could allow competing carriers "access to an entire preassembled network." *Id.* However, as the vacated reconfiguration rules were not before the Court, the Court did not address whether the statute requires an incumbent carrier to custom-build a new network for competitors on demand, nor did it consider whether its rationale for reinstating the no-separation rule applied to the reconfiguration rules. Indeed, the reconfiguration rules, which have nothing to do with imposing wasteful burdens on competitors or disassembling an existing network at all, are entirely different in substance.

The *Iowa Utilities Board* case remains pending before the Eighth Circuit on remand, in part to determine the status of the unappealed network reconfiguration rules. In a June 10, 1999 order, the Eighth Circuit directed the parties to address the effect of this Court's decision on a number of FCC rules, including the reconfiguration rules. *See* App. 114a. Incumbent LECs have maintained that the Eighth Circuit's original vacation of those rules still stands, and that the reasons for this Court's reinstatement of the no-separation rule are inapplicable to the reconfiguration rules. The Eighth Circuit heard arguments on September 17, 1999, and a decision is awaited.

C. The WUTC and Ninth Circuit Proceedings Below

In 1996, MFS Intelenet, Inc. ("MFS"), a competitive local exchange carrier ("LEC"), began negotiating with U S WEST, an incumbent LEC, for interconnection in the State of Washington pursuant to section 251 of the Act. The parties were unable to resolve all issues by negotiation, and MFS requested arbitration by the Washington Utilities and Transportation Commission ("WUTC") pursuant to section 252. Following a hearing, the appointed arbitrator issued a report resolving the outstanding issues. In particular, the arbitrator imposed a condition consciously modeled on the FCC reconfiguration rules, requiring U S WEST "to perform . . . the functions necessary to combine requested elements in *any* technically feasible manner either with other elements from [U S WEST's] network, or with elements possessed by MFS," whether or not those combinations exist in U S WEST's own network. App. 12a n.7 (emphasis added). The WUTC approved the arbitrated agreement without substantive opinion. App. 37a-38a.

U S WEST filed this suit in the United States District Court for the Western District of Washington under section 252(e)(6), alleging that the agreement as approved—including the reconfiguration requirement—was unlawful under the Act. The Eighth Circuit's decision vacating the

FCC's reconfiguration rules was handed down in the interim. The district court in this case granted summary judgment for MFS on the relevant issues, holding, *inter alia*, that the reconfiguration requirement was consistent with the Act. App. 31a.[1]

U S WEST then appealed to the Ninth Circuit. While the appeal was pending, this Court issued its decision in *Iowa Utilities Board*, and the Eighth Circuit began its ongoing proceedings to redetermine the validity of the FCC's reconfiguration rules in light of this Court's opinion. The Ninth Circuit, without waiting for the Eighth Circuit to determine the effect of this Court's decision on the FCC rules pending on direct review, then decided for itself the lawfulness of the reconfiguration requirement embodied in those vacated rules. The court below concluded that "it necessarily follows from *AT&T* that requiring U S WEST to combine unbundled network elements is not inconsistent with the Act . . . ." App. 13a. The court below dismissed U S WEST's argument that the Eighth Circuit's ruling vacating the FCC reconfiguration rules, unless and until reversed by the Eighth Circuit on reconsideration, required it to strike the identical reconfiguration provision in the WUTC agreement as unlawful under the Act. Instead, the Ninth Circuit offered its own analysis of the rules' validity after *Iowa Utilities Board*:

> The Supreme Court opinion . . . undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not

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[1] The district court distinguished the Eighth Circuit's decision on grounds not relevant to the Ninth Circuit's opinion or to this petition. *See* App. 28a-29a (concluding that the Eighth Circuit's concern that competing carriers could obtain finished services at the cost of the constituent network elements, instead of at the wholesale price for finished services, did not apply in this case because the WUTC had imposed a recombination fee equal to the difference between the network element cost and the wholesale rate).

> directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

App. 14a. The Ninth Circuit rejected the idea that the Hobbs Act vested the Eighth Circuit with exclusive jurisdiction to determine the validity of the reconfiguration rules, since (it said) it was simply applying the Act rather than the FCC rules under direct review.[2]

U S WEST sought rehearing and rehearing en banc, urging the court below to reconsider its usurpation of the Eighth Circuit's jurisdiction. The court denied rehearing on January 12, 2000.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW USURPED THE EIGHTH CIRCUIT'S EXCLUSIVE JURISDICTION TO DETERMINE THE VALIDITY OF THE FCC RULES AND DESTROYED THE UNIFORMITY OF FEDERAL LAW ENSURED BY THE HOBBS ACT.

The Hobbs Act vests the Eighth Circuit with *exclusive* jurisdiction to determine the validity of the FCC's network element reconfiguration rules. This means that no other federal court may consider a direct or collateral challenge to the same rules, or issue any decision that has the practical

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[2] Ironically, the court below did recognize the Hobbs Act's limitation on its jurisdiction with respect to the WUTC's implementation of a different FCC order regarding telephone number portability; the court stated that that order "is not subject to collateral attack in this proceeding." App. 11a (citing 28 U.S.C. § 2342; *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468-69 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397-400 (9th Cir. 1996)).

effect of prejudging the validity of those rules. The Ninth Circuit attempted to skirt this preclusion by purporting to interpret the Telecommunications Act rather than the FCC rules themselves. This gambit, however, ignored the fact that the court was reviewing a WUTC requirement that was itself just an implementation of the FCC rules under consideration in the Eighth Circuit.

The Court should hear this case to make clear that when one circuit is considering the validity of agency rules on direct Hobbs Act review, a second circuit may not supplant that circuit's role—least of all when it is reviewing the decision of a state regulator that is *itself* bound to follow both the agency's rules and the Hobbs Act court's authoritative pronouncements on those rules. The decision below leaves the process of judicial review under the Telecommunications Act in chaos and conflicts with another circuit's (correct) understanding of how such review must proceed.

A. The Hobbs Act Vested the Eighth Circuit with Exclusive Jurisdiction To Decide Whether the Reconfiguration Rules Comply with the Telecommunications Act, and the Ninth Circuit Was Not Free To Ignore That Court's Prior Ruling or Ongoing Proceedings.

The Hobbs Act (also known as the Administrative Orders Review Act), Pub. L. No. 81-901, ch. 1189, 64 Stat. 1129 (1950) (codified in pertinent part at 28 U.S.C. §§ 2341 *et seq.*), governs all challenges to FCC rules. *See* 47 U.S.C. § 402(a) ("Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under [the Act] . . . shall be brought as provided by and in the manner prescribed in chapter 158 of title 28."). The basic purpose of the Hobbs Act is simple: to ensure the uniform interpretation and application of the federal agency rules to which it applies. *See, e.g., Carpenter v. Department of Transp.*, 13 F.3d 313, 316 (9th Cir. 1994) (noting Congress's intent "to increase the speed, efficiency and consistency of judicial review");

Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901, 907 (8th Cir. 1984) (the Act "avoids the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issues"), *vacated on unrelated grounds*, 476 U.S. 1167 (1986).[3]

The Hobbs Act achieves this purpose by vesting a single federal court of appeals with *exclusive* jurisdiction to judge the legality of the agency action in question. A party aggrieved by a covered agency order petitions directly to a court of appeals for review. 28 U.S.C. § 2344.[4] That court of appeals "has *exclusive* jurisdiction to enjoin, set aside, suspend (in whole or in part), or *to determine the validity of*" the action under review. *Id.* § 2342(1) (emphases added). *See also id.* § 2349(a) ("The court of appeals in which the record on review is filed . . . has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."). Thus, if a petition to review agency rules has been filed in a federal circuit court pursuant to the Hobbs Act, and that court is in the midst of

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[3] Congress reaffirmed the Act's purpose when it added the Interstate Commerce Commission to the list of agencies subject to Hobbs Act review: "The problem of multiple suits challenging a single ICC order in different locations before different courts[] would disappear and with it the potential for disparity in results and nonuniformity." H.R. Rep. No. 93-1569 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7025, 7033.

The Act also serves related purposes such as vesting review in an appellate panel instead of a single district court judge and ensuring review on the administrative record instead of de novo factfinding. *See Southwestern Bell*, 738 F.2d at 906-07. Congress intended to eliminate the duplication of effort that had occurred under prior law, when agency orders were appealed to district courts with de novo review. *Id.* at 907 (citing H.R. Rep. No. 2122, at 3-4 (1950)).

[4] If petitions for review are filed in multiple circuits within the first ten days after an order is released, the federal judicial panel on multidistrict litigation consolidates the petitions and assigns the consolidated case by lottery to a single circuit. *See* 28 U.S.C. § 2112(a)(3).

proceedings to determine the legality of the rules, no other court may hear a challenge to the same rules.

As this Court and others have made clear, the Hobbs Act's jurisdictional preclusion is broad in scope. In addition to barring *direct* attempts to review agency rules outside the court vested with exclusive jurisdiction, the Hobbs Act also forbids *indirect* challenges that necessarily question the validity of the agency's action. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (barring district court suit to enjoin FCC from taking action that is the subject of an order under Hobbs Act review); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-70 (1970) (forbidding district court to consider lawfulness of Federal Maritime Commission-approved tariff in rate dispute between shipper and terminal operator, since FMC orders are subject to Hobbs Act review); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1996) (dismissing politicians' suit against broadcasters over election advertising rates, where an FCC order required such complaints to be brought at the agency; hearing the suit would have the same effect as invalidating the FCC order, which could only be done on Hobbs Act review); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir. 1986) (dismissing claim because relief sought by railroad workers' union under Railway Labor Act would have overturned order of Interstate Commerce Commission and therefore "was, in essence, a collateral attack upon the ICC's order").[5] As the cited examples

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[5] *See also Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 354 (8th Cir. 1981) (declining to enjoin enforcement of shipping rate allowances because Federal Maritime Commission had found the allowances to be permitted under approved tariff agreements: "In order to grant such relief the district court would have had to find that the uniform allowances had not been established pursuant to an approved conference agreement . . . . So considered, it is clear that appellant's complaint is an improper attempt to seek collateral review of the merits of the Commission's decision in the district court.") (internal citation

demonstrate, a suit does not have to challenge an agency order directly—nor need the agency be a party—to run afoul of the Hobbs Act's jurisdictional bar; it is enough if the suit "[i]n substance . . . raise[s] the same issues" being considered in a Hobbs Act challenge, *ITT World Communications*, 466 U.S. at 468, or if "the practical effect" of resolving the suit would be "a determination of [a federal order's] validity." *Southwestern Bell*, 738 F.2d at 906.

The Ninth Circuit below did exactly what the Hobbs Act forbade it to do: it "determine[d] the validity of" the FCC's reconfiguration rules while that very question was pending in—and committed to the exclusive jurisdiction of—the Eighth Circuit. 28 U.S.C. § 2342. The court simply declared that the Eighth Circuit's vacation of the rules was no longer good law, in light of this Court's opinion in *Iowa Utilities Board*:

> U S West nevertheless argues that the Eighth Circuit's invalidation of the FCC regulation that required incumbent carriers to combine elements for competing carriers, *see* 47 C.F.R. 51.315(c)-(f), requires this court to conclude that the MFS combination provision violates the Act. The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that *the Eighth Circuit erred when it concluded that the regulation was inconsistent with the [Telecommunications] Act.*

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omitted); *Air Transport Ass'n v. Public Utils. Comm'n*, 833 F.2d 200, 206 (9th Cir. 1987) (declining to decide whether Federal Communications Act preempted state regulation because FCC had considered and rejected preemption issue in denying a petition for rulemaking).

App. 13a-14a (emphasis added). The Eighth Circuit—the court most familiar with the *Local Competition Order*, the administrative and judicial record, and the history of the prior proceedings—remains in the process of determining whether it should modify its original decision to vacate the FCC's reconfiguration rules in light of this Court's pronouncements on a different set of rules. For the Ninth Circuit to short-circuit that process and flatly proclaim that its sister circuit "erred" violates the jurisdictional plan of the Hobbs Act.[6]

The fact that the court below was reviewing a state regulator's *implementation* of FCC rules rather than the FCC rules themselves is irrelevant. The WUTC cited no authority for its network element obligations *other than* the FCC rules under review in the Hobbs Act proceedings. *See* App. 55a-57a. Indeed, the language of the WUTC's reconfiguration requirement closely tracks the FCC reconfiguration rules. Once the Eighth Circuit had vacated the reconfiguration rules as contrary to the Telecommunications Act on direct Hobbs Act review, the federal courts reviewing the state regulatory implementations of those rules were bound to follow. The Ninth Circuit could not decide otherwise without determining the very same substantive issues pending before the Hobbs Act court on reconsideration.

The Ninth Circuit's suggestion that a federal court reviewing state arbitral decisions under section 252(e)(6) of the Telecommunications Act need not follow a Hobbs Act court's authoritative construction of the FCC rules that the state regulators have applied puts the Ninth Circuit in direct conflict with the Fourth Circuit. In *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999), an incumbent carrier challenged a state arbitrator's application of the FCC's

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[6] The Ninth Circuit, of course, was not the court of appeals vested with exclusive jurisdiction under section 2342 of the Hobbs Act. The Ninth Circuit was hearing this case on an appeal from a district court decision under 28 U.S.C. § 2391, not on a direct petition for review under 28 U.S.C. § 2344.

pricing rules in a section 252(e)(6) proceeding, contending that the rules' methodology was contrary to the Act. The Fourth Circuit squarely held that the judicial review provision of the Telecommunications Act does not authorize such an end run around the Hobbs Act:

> GTE attempts to avoid the Hobbs Act's exclusive review mechanism by invoking § 252(e)(6). Because that section gives district courts (and us on appeal) the authority to determine whether a state arbitration decision meets the requirements of the Act, GTE argues that we must necessarily have the authority to determine the validity of FCC rules if we apply them in evaluating [a state commission's] decision. . . . We disagree. . . . [A] party cannot use an appeal from a district court to circumvent the Hobbs Act's requirement that a challenge to an FCC order is subject only to *direct* review in a court of appeals.

199 F.3d at 742-43. The Fourth and Ninth Circuits have thus taken precisely opposite stances on the authority of a section 252(e)(6) court to supplant the exclusive authority of the Hobbs Act court to determine the validity of FCC rules.[7]

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[7] The Ninth Circuit's decision conflicts with several district court decisions as well. *See AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932, 1999 WL 1128466, at *24 (W.D. Mo. 1999) ("Although th[is] Court . . . would vacate [an FCC rule regarding unbundling of elements] pursuant to the logic of the Supreme Court's decision [in *Iowa Utilities Board*] if it had the authority to do so, the fact remains that this Court lacks jurisdiction to vacate FCC regulations. . . . [The regulation] is still a valid FCC regulation that cannot be challenged in this Court."); *Michigan Bell Tel. Co. v. Strand*, 26 F. Supp. 2d 993, 999-1000 (W.D. Mich. 1998) (Although the complaint challenged provisions of the state commission's order and not the FCC's order, "the logical consequence of this challenge is that the FCC's Order is invalid. Because such determination is sought, this Court is barred by the exclusive jurisdiction provisions of [the Telecommunications Act and the Hobbs Act] from meddling in the exclusive work of the Circuit Courts of Appeals.").

This Court should resolve this conflict by correcting the Ninth Circuit's error.

B. If Permitted To Stand, the Ninth Circuit's Overreaching Will Threaten the Primacy and Uniformity of Federal Law Under the Telecommunications Act.

The Ninth Circuit's decision boils down to an odd proposition: Even though a state regulator arbitrating an interconnection dispute is bound to follow the FCC's rules, *see* 47 U.S.C. § 252(c)(1), and even though a federal court reviewing the arbitral decision must determine whether the state regulator has met this requirement, *see id.* § 252(e)(6), both the state regulator and the federal court are free to *ignore* the vacation of those rules by a Hobbs Act court. This cannot be. If state regulators (and reviewing federal courts) must follow the FCC rules implementing the Telecommunications Act, then they must *also* follow the determination of the validity of those rules by the court vested with exclusive jurisdiction to review them. To rule otherwise takes the Telecommunications Act's primary tool for "bring[ing state regulators] to heel"—section 252(e)(6) judicial review—and turns it into a license for states to make their own federal law. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

Section 252 of the Telecommunications Act sets the rules for negotiating and arbitrating interconnection agreements, and Congress gave state regulators a limited role in that process. State regulators must follow federal law in arbitrating disputes, and any federal regulatory conditions they impose on carriers in arbitrations must comply with both section 251 and the FCC's rules implementing it. *See* 47 U.S.C. § 252(c)(1), (e)(2)(B). As this Court put it, state regulators are not simply "allowed to do their own thing" in Congress's plan; rather, they "must hew" to the lines drawn

by the FCC and federal courts. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

Federal district court review under section 252(e)(6) is the essential check for ensuring that state regulators obey federal law and stay within their permitted role. (Indeed, it is the *only* check, since Congress barred state courts from reviewing these arbitrations. *See* 47 U.S.C. § 252(e)(4).) This Court has acknowledged that the federal district courts are the guardians of the primacy and uniformity of federal law under the Act: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. *See also Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 14 (1st Cir. 1999) ("The Act exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are *guided by the provisions of the Act and by the concomitant FCC regulations* . . . and *checked by federal court review for consistency with these federal provisions*.") (citations omitted and emphases added).

The Ninth Circuit's decision destroys Congress's plan and its guarantee of uniformity. The decision suggests that federal courts reviewing state arbitral decisions under section 252(e)(6) are free to disregard a Hobbs Act court's vacation of the FCC rules that the arbitrators are supposedly applying. While the whole point of the Hobbs Act is to ensure the uniform application of federal agency rules by consolidating all review in a single court, the Ninth Circuit blows the process wide open, authorizing every federal district court reviewing a state's application of those rules to determine their validity anew.[8]

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[8] The Ninth Circuit has recently magnified this risk by holding that the *only* thing a federal court reviewing a state arbitral decision may consider is whether the state regulator has taken some action that actually violates

This very case illustrates the potential for chaos. The Eighth Circuit's proceedings to reconsider its vacation of the FCC reconfiguration rules are still underway. If the Eighth Circuit decides that the rules are contrary to the Telecommunications Act and should remain vacated, the rules will be vacated on a national basis. But under the decision below here, incumbent carriers' obligations in the Ninth Circuit states may diverge from the rest of the country: the Ninth Circuit has upheld the power of state regulators, acting on the basis of the very rules held invalid by the Eighth Circuit, to impose a reconfiguration duty on incumbent carriers. The Ninth Circuit's decision creates the very situation that the Hobbs Act was enacted to prevent—conflicting rulings in different circuits on the validity of the same agency rules.[9] The Court should grant this petition to restore order to the process of judicial review under the Telecommunications Act.

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an express prohibition of the Act. *See MCI Telecommunications Corp. v. U S WEST Communications*, 204 F.3d 1262, 1268 (9th Cir.), *pet. for reh'g filed* (Mar. 23, 2000). The effect of this holding is to permit state regulators to create new federal law obligations out of whole cloth, regardless of whether they have any affirmative basis in the Act, as long as they are not specifically forbidden. The combined effect of the two decisions is to free state regulators from having to follow the Hobbs Act court or to ground their actions in some specific grant of federal authority—making inconsistent application of federal law a virtual certainty.

[9] A number of district courts also have gone down this wayward path. *See, e.g., MCI Telecommunications Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp. 2d 768, 785 & n.16 (E.D. Mich. 1999) (concluding that this Court impliedly vacated another FCC rule, despite recognizing that the rule's validity is currently under review in the Eighth Circuit); *MCI v. Bell-Atlantic*, 36 F. Supp. 2d 419, 424 & n.4 (D.D.C. 1999) (concluding that this Court impliedly vacated another FCC rule).

II. THE COURT BELOW WRONGLY CONCLUDED THAT THE *IOWA UTILITIES BOARD* DECISION REVIVED THE FCC'S RECONFIGURATION RULES.

In addition to usurping the Eighth Circuit's exclusive jurisdiction to determine the validity of the FCC's rules under this Court's decision in *Iowa Utilities Board*, the Ninth Circuit was wrong on the merits. The court below acknowledged that this Court "did not directly review the Eight Circuit's invalidation of § 51.315(c)-(f)" (App. 14a)—because no party sought such review—but nevertheless opined that *Iowa Utilities Board* undermined the Eighth Circuit's rationale. This was simply wrong: The Court's reasons for upholding a rule barring incumbents from tearing apart their existing networks before giving competitors access to them have nothing at all to do with the vacated rules requiring incumbents to custom-build entirely new configurations of elements upon their competitors' requests. One rule prevents incumbents from imposing wasteful and gratuitous burdens on competitors; the other forces incumbents to expend resources to give their competitors an affirmative leg up in the market.

The Telecommunications Act imposes on an incumbent carrier

> [t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, *nondiscriminatory access to network elements on an unbundled basis* . . . . An incumbent local exchange carrier shall provide such unbundled network elements *in a manner that allows requesting carriers to combine such elements* in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3) (emphases added). As noted, the FCC's rules under this section imposed both a no-

separation-of-elements-already-combined requirement, 47 C.F.R. § 51.315(b), and a reconfigure-to-suit-the-competitor requirement, *id.* § 51.315(c)-(f). In its original decision, the Eighth Circuit vacated both sets of rules, focusing the bulk of its analysis on the reconfiguration rules. The court held that requiring incumbent carriers to reconfigure and combine network elements not already combined in the incumbents' networks "cannot be squared with the terms of subsection 251(c)(3)," because the statutory language "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997). The court explained that, while the Telecommunications Act requires incumbent carriers to provide unbundled elements in a manner that enables competing carriers to combine them, nothing in the Act suggests that incumbents must perform combining for their competitors: "[T]he plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent [carriers] to do *all* of the work." *See id.* The Eighth Circuit then separately addressed the no-separation rule, also finding it unlawful and vacating it. *See id.*

This Court's reinstatement of the no-separation rule did not, and could not, impliedly restore the reconfiguration rules as well. This Court ruled that the FCC could, by virtue of the nondiscrimination requirements in section 251, rationally prohibit incumbents from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *Iowa Utils. Bd.*, 525 U.S. at 395 (internal quotation marks and citation omitted). The Court found that it would be discriminatory to force an incumbent's competitors to recombine elements that, but for the incumbent's having disconnected them, would already be combined, since incumbents would not have to engage in that wasteful exercise.

But the reconfiguration rules have nothing to do with such discrimination. Because these rules deal with elements that are *not* already combined, either the incumbent or its competitor will have to combine those elements to provide a new service; leaving that task to the competitor when it purchases the elements does not discriminate or impose any wasteful costs. Rather, it requires the competitor to incur the *same* costs that the incumbent would incur if it decided to offer a service requiring this new combination. Thus, the Court's rationale for reinstating the no-separation rule simply does not apply to the reconfiguration rules, and the Ninth Circuit's determination of those rules' validity was substantively wrong. More fundamentally, as explained above, the court should not have undertaken this determination at all: only the Eighth Circuit had the power under the Hobbs Act to decide the validity of the reconfiguration rules.

CONCLUSION

The petition for a writ of certiorari should be granted.[10]

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[10] In light of the importance of these issues to the implementation of federal statutes, the Court may wish to invite the Solicitor General to file a brief expressing the views of the United States.

Respectfully submitted,

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